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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. 237.

WILLIAM G. WHEAT, Petitioner,

vs.

FORD MOTOR COMPANY, A CORPORATION, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANK PARKER DAVIS,
I. JOSEPH FARLEY,
Counsel for Respondent.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition appears to us to be so obviously groundless that we can see no occasion for any detailed reply to it. No basis is shown to exist for granting certiorari, such as any one of those bases exampled in the rules of this Court, nor is there any other reason for the issuance of the writ. A simple private controversy has been waged in nowise of public interest, and no unsettled

question of law is involved. Indeed the case did not turn upon any question of law but upon a plain issue of fact, to-wit, that of infringement of a patent. The patent in suit has not been litigated elsewhere so no conflict of judicial opinions exists concerning it. Both the District Court and the Court of Appeals based their decisions on non-infringement. The only opinions that are in conflict are the opinion of petitioner's counsel and the concurring opinions of those courts.

The claims of this patent are very limited, and their limitations are emphasized by the proceedings had in the Patent Office during prosecution of the application for the patent (Defendant's Exhibit 2, Tr. p. 315). These claims clearly fail of application to the accused construction,—either literally, in substance, or under doctrine of mechanical equivalents. It is of no consequence what standing the purported invention may have had in the art which might have warranted the granting of broader claims. Every element of each claim is made material by its inclusion therein, so that the total absence from the accused construction of certain specified elements necessarily excludes that construction from the scope of the claims.

In point of fact the prior art of record, which includes illuminating patents and publications unnoticed by the Patent Office, left little or nothing of novelty in the subject matter of the patent in suit (see *e. g.*, Defendant's Exhibit 8, p. 369; Exhibit 16, p. 401; Exhibit 17, p. 425; Exhibit 18, p. 441; Exhibit 19, p. 443; and Exhibit 20, p. 445). The claims, limited as they are to trifling details of construction, nevertheless well measure what little the patentee contributed to the art,—not enough indeed to suggest anything whatever of a patentable nature.

If any such practice was countenanced as that upon which the petition proceeds, in complete disregard of the statutory requirement that the applicant for a patent "shall particularly point out and distinctly claim the part, improvement, or construction which he claims as his invention or discovery", chaos would result in the administration of the patent laws.

A further example of petitioner's misdirected effort is to be found in a shifting of ground for his infringement contention. At trial he went upon the proposition that an equivalent of his Z-shaped bracket was to be found in the up-turned front end portions of the *side rails or sills* of respondent's chassis. Now he shifts from that position to an attempt at finding an equivalent in the *front cross member* of respondent's chassis.

Thus petitioner would have this Court issue a writ of certiorari for review on a different theory of infringement from that which will be found upon the record to have been advanced below,—a singularity in conception of Supreme Court practice in patent jurisprudence, to say the least. "He is not permitted thus to mend his hold." *Railway Co.* v. *McCarthy*, 96 U. S. 258, 267.

We submit that the petition is wholly without merit and should be denied.

Respectfully submitted,
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I. JOSEPH FARLEY,
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